**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **RICARDO DIAZ** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,002,592 |
| **WILSON PLUMBING COMPANY** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **BUILDERS' ASSOCIATION SELF-INSURERS' FUND OF KANSAS** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent appeals the December 5, 2003 Award of Administrative Law Judge Kenneth J. Hursh. Claimant was granted benefits for a 55 percent permanent partial general disability to the body as a whole for injuries suffered on December 14, 2001. The Appeals Board (Board) held oral argument on May 25, 2004. E. L. Lee Kinch was appointed as Board Member Pro Tem for the purposes of this appeal in place of Board Member Julie A.N. Sample, who recused herself from the proceedings, having been involved as an administrative law judge in this litigation prior to her appointment to the Board.

### APPEARANCES

Claimant appeared by her attorney, Michael R. Wallace of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, C. Anderson Russell of Kansas City, Missouri.

### RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). Additionally, the parties acknowledge that claimant had been paid $19,112.73 in temporary total disability compensation payments at the Missouri weekly rate of $530.91. While it was originally thought that this covered 35 weeks of payments, computation of the numbers resulted in a determination that

claimant had been paid for 36 weeks. The parties acknowledge that based upon the Kansas statutory rate of $417 per week, this would constitute an overpayment of $113.91 per week, for a total overpayment of $4,100.73. Claimant argues that no credit should be provided for this overpayment as the temporary total disability payments were made in Missouri, under Missouri law. The parties acknowledge that a stipulation (contained on page 3 of the regular hearing transcript), which stated that an overpayment of $4,517.73 had occurred, was incorrect and that the Board should recompute the numbers due and owing after determining whether a credit was appropriate.

## ISSUES

(1) If there was an overpayment of temporary total disability compensation, is respondent entitled to a credit under K.S.A. 44-525, even though payments were made through the Missouri workers compensation system and at the appropriate Missouri weekly rate?

(2) What is the nature and extent of claimant's injury and disability? More particularly, what task and wage loss did claimant suffer under K.S.A. 44-510e?

(3) Did the Administrative Law Judge's computation of the award violate K.S.A. 44-510f, in that the total award exceeded the $100,000 statutory maximum?

(4) Did the ALJ exceed his jurisdiction in quashing the subpoena filed by respondent which requested claimant's post-award financial records?

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant, a union laborer, was employed through the union with respondent on December 14, 2001, when, while picking up a manhole lid, he suffered injury to his upper back and neck. Medical treatment was provided by his employer, with a referral to Wesley E. Griffitt, M.D. Claimant underwent a fusion of his neck at C6-C7, remaining under Dr. Griffitt's treatment until August 22, 2002, at which time he was provided a final release.

Beginning in July 2002, claimant started his own business, named Diaz Landscaping & Utilities. As of the regular hearing, that business entity remained a viable business, with claimant involved in what he described as a partnership with Ronnie McGarrah, owner of

McGarrah Construction Company. Claimant did testify that he attempted to return to work with respondent, but they were unable to take him back within the restrictions. Claimant's job duties regularly required that he lift in excess of 50 pounds, which exceeded the restrictions of both claimant's expert, board certified orthopedic surgeon Edward J. Prostic, M.D., and respondent's expert, orthopedic surgeon Theodore L. Sandow, Jr., M.D. Claimant acknowledged that other than contacting respondent, he made no attempt to obtain employment through any other business entity, but chose to concentrate his efforts on making the Diaz Landscaping & Utilities company a viable and successful entity. Claimant was provided substantial work from Mr. McGarrah, the owner of McGarrah Construction Company and a partner in Diaz Landscaping & Utilities.

Financial information was provided for both the years 2002 and 2003, detailing claimant's income and expenses. Claimant's tax reports for the year 2002 were placed into evidence at the regular hearing, showing claimant's gross receipts and expenses, and a W-2 showing income generated from Diaz Landscaping & Utilities.

Claimant was referred to Dr. Prostic at his attorney's request for an evaluation. Dr. Prostic found claimant to have suffered an 18 percent impairment to the body as a whole on a functional basis pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). Additionally, Dr. Prostic had the opportunity to review a task list created by vocational expert Terry Cordray. After reviewing the list, Dr. Prostic opined claimant had suffered a 54 percent loss of tasks. The ALJ in reviewing the tasks, determined that there were really only twenty-four non-duplicate tasks, of which claimant was unable to perform twelve, which computes to a 50 percent task loss.

Claimant was also referred to orthopedic surgeon Theodore L. Sandow, M.D., by respondent for an examination. Dr. Sandow assessed claimant a 10 percent impairment to the body as a whole based upon the AMA *Guides* (4th ed.), finding, of the twenty-seven tasks listed by vocational expert Michael Dreiling, claimant was incapable of performing six, for a 22 percent task loss. However, the ALJ, here, also found duplicate tasks, finding of the twenty-five non-duplicative tasks, claimant was unable to perform six, for a 24 percent task loss. Dr. Prostic restricted claimant from lifting more than 50 pounds occasionally and 20 pounds frequently, and advised that he avoid more than minimal activities with his head away from the neutral position and avoid the use of vibratory equipment. Dr. Sandow limited claimant's repetitive lifting to 40 pounds or less, arguing against Dr. Prostic's 20-pound restriction as being too restrictive.

On October 28, 2003, respondent had issued from the Division of Workers Compensation a Subpoena Duces Tecum to Diaz Landscaping & Utilities, requesting:

> All records of payments made to Diaz Landscaping and Utility from any source and any outstanding invoices to any entity from Diaz Landscaping and Utility that are

> pending payment at this time. Further, request any records of jobs or projects currently in process and a client or customer list for the year 2003.

Respondent's subpoena was the focus of attention at the motion hearing held November 10, 2003, at which time the ALJ determined that claimant's Motion To Quash this subpoena was appropriate, and respondent's request for the additional information was denied. The Order quashing the subpoena lists no justification for the denial. However, claimant, at the motion hearing, argued that he had voluntarily provided the 2002 IRS tax returns, showing complete income tax records for that year. Additionally, claimant argued that respondent had the opportunity to depose Ronnie McGarrah, claimant's partner, questioning Mr. McGarrah at length regarding the landscaping and construction income. Finally, claimant argued that respondent was ultimately attempting to obtain the gross receipts, outstanding receipts and customer lists for Diaz Landscaping & Utilities, which claimant argued would not relate to claimant's post-injury wage. Respondent counters that it would lead to the discovery of relevant information. Claimant also argued that his post-injury wage could be ascertained from the W-2s, which had been provided.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[1]

With regard to the alleged overpayment of temporary total disability compensation, the Board finds that claimant was entitled to temporary total disability at the maximum rate of $417 per week, which constitutes an overpayment of $4,100.76 for the 36 weeks claimant was paid benefits. Claimant argues there is no provision under the Kansas statutes for reimbursement when the payments are made through the Missouri workers compensation system. However, K.S.A. 44-525(c) allows a credit for any overpayment of temporary total disability compensation ordered under K.S.A. 44-534a and amendments thereto. There is no limitation which allows the credit only for payments through the Kansas system. Additionally, here claimant elected to proceed under the Kansas Workers Compensation Act. The Board, therefore, finds that the Kansas Workers Compensation Act applies to this claim and respondent is entitled to a credit for the overpayment of temporary total disability compensation, which will be calculated at the time of final award.

The Board further acknowledges that K.S.A. 44-510f limits awards of temporary total disability compensation and permanent partial general disability compensation to a maximum of $100,000. Therefore, any award computed in this matter will be limited by the statutory limits set forth in K.S.A. 44-510f.

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[1] K.S.A. 44-501 and K.S.A. 44-508(g).

K.S.A. 44-510e defines permanent partial general disability as:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

Dr. Prostic, in reviewing the task list created by Mr. Cordray, found claimant incapable of performing fourteen of the twenty-six tasks listed. The ALJ, in reviewing that task list, found that task 9 and task 22 were not accurately represented and, therefore, reduced the task list to twenty-four, rather than twenty-six. In reviewing the task list, the Board finds task 6 and task 8, which include "picking items off the shelf and putting them on the cart" and "picking items out of the cart and stocking the shelves with them" to be essentially identical. Therefore, those tasks will be combined, reducing the overall task list to twenty-five. However, task 22, which is described as "laying the pipe and connecting the pieces together in and around the trench," is not identical to task 20, which is described as "connecting pipe with nuts and bolts." In both tasks, claimant is required to lift in excess of 50 pounds. However, laying the pipe and connecting the pieces together is not the same task as connecting the pipe with nuts and bolts, and the Board finds combining those tasks is not appropriate. Therefore, the list of Mr. Cordray is reduced to twenty-five tasks, of which claimant is unable to perform thirteen, for a 52 percent loss of task performing ability. Additionally, the ALJ, in reviewing the task list of Mr. Dreiling (which was reviewed by Dr. Sandow), found of the twenty-seven tasks listed, task 6 and task 8 were identical to those of Mr. Cordray, which involved moving supplies from the shelf to the cart and then returning the supplies from the cart to the shelf. This reduces the task list, when eliminating the duplicates, to twenty-six, of which claimant is unable to perform six, for a 23 percent loss of task performing abilities.

The Board finds no justification in placing greater weight on the opinion of Dr. Prostic over that of Dr. Sandow, or vice versa. Therefore, in averaging the two, the Board finds claimant has suffered a task loss of 38 percent.

A more vexing question deals with what, if any, wage loss claimant has suffered. K.S.A. 44-510e requires that the difference between the average weekly wage a worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury be considered, with the wage loss being the difference between the two. Respondent contends that claimant has failed to put forth a good faith effort to obtain employment in that claimant, rather than pursuing his job opportunities through the union, elected to start his own business in the field of landscaping and utility work. While the Board acknowledges starting one's own business is not always the best course to pursue, the Board finds, in this instance, that claimant's actions did constitute a good faith effort.

Claimant was placed under specific restrictions by both Dr. Sandow and Dr. Prostic, which would have limited his ability to return to work as a union laborer. Claimant testified that 30 to 40 percent of his job duties required that he lift in excess of 50 pounds, which violated both the restrictions of Dr. Sandow and Dr. Prostic. This would have significantly limited claimant's ability to return to work in that capacity.

Additionally, the work that claimant performed over the preceding 15 years involved substantial manual labor, with lifting in excess of 50 pounds on a regular basis. The Board also considered the fact that in claimant's prior work history, claimant had experience in landscaping, as he worked in that capacity with Memorial Gardens in 1993. Finally, the Board considers the fact that claimant was provided with a ready made client in the form of Ronnie McGarrah of McGarrah Construction Company. Mr. McGarrah, a partner of claimant in Diaz Landscaping & Utilities, provided substantial work to claimant in both landscaping and utilities. This generated significant income to claimant both in 2002 and in 2003. In fact, the testimony of Mr. McGarrah indicated that claimant's six-month income for 2002 was limited to slightly over $14,000 gross receipts, with this number increasing substantially during the first eight months of 2003 to over $37,000 in gross receipts. This is further indication that claimant's business was proving successful and claimant's efforts at self-employment were in good faith.

Respondent, in its attempt to ascertain claimant's post-injury wage, issued a subpoena from the Director of Workers Compensation, requesting that certain post-injury financial records from claimant be provided in order to make that financial determination. At the November 10, 2003 hearing on claimant's Motion To Quash that subpoena, the ALJ determined that claimant's Motion To Quash was appropriate and respondent's request for the financial information was not justified. It should first be noted that administrative law judges have the power to issue subpoenas and compel attendance to the same extent as district court judges.[2] Additionally, when subpoenas are served,

> Where there is a possibility of relevancy in documents subpoenaed and there is no showing that the subpoena is unreasonable or oppressive the statutes granting the power to subpoena should be liberally construed to permit inquiry. *Yellow Freight*, 214 Kan. 120, Syl. ¶ 4.[3]

In administrative settings, the stringent requirements of subpoenas are even more relaxed.

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[2] *Sebelius v. LaFaver*, 269 Kan. 918, 9 P.3d 1260 (2000).

[3] *In re Tax Appeal of Collingwood Grain, Inc.,* 257 Kan. 237, 255, 891 P.2d 422 (1995), citing *Yellow Freight System, Inc., v. Kansas Commission on Civil Rights*, 214 Kan. 120, 519 P.2d 1092 (1974).]

> The stringent relevancy requirements of subpoenas in aid of civil or criminal litigation do not apply to administrative agency subpoenas. Following *Yellow Freight System, Inc.* (citation omitted).[4]
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> Administrative subpoenas which have previously been condemned as "fishing expeditions" are now permitted, and administrative subpoenas may be enforced for investigative purposes unless they are plainly incompetent or irrelevant to any lawful purpose. *Atchison, T. & S.F. Rly. Co. v. Lopez*, 216 Kan. 108, 531 P.2d 455 (1975).[5]

In this instance, the Board finds that the financial information dealing with claimant's income generated from Diaz Landscaping & Utilities is relevant to claimant's post-award wage earnings. The Board has found that claimant's decision to begin his own business constituted good faith under *Copeland.*[6] Therefore, a specific determination under K.S.A. 44-510e must be made as to the average weekly wage that the claimant "is earning after the injury."[7] The ALJ's Order quashing the subpoena of respondent constituted error and must be reversed. This matter will, therefore, be remanded to the ALJ for additional determinations regarding the wage claimant is earning, post award, pursuant to K.S.A. 44-510e.[8]

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated December 5, 2003, should be, and is hereby, modified to award claimant a 13.5 percent permanent partial disability to the body as a whole on a functional level pursuant to the stipulation of the parties. The matter is remanded to the Administrative Law Judge for additional determinations regarding what, if any, permanent partial general disability claimant would be entitled to under K.S.A. 44-510e pursuant to the above findings. Respondent is entitled to a credit for the overpayment of temporary total disability compensation, as above computed, pursuant to K.S.A. 44-525. Additionally, the Board finds that the Award of the Administrative Law Judge should be modified to find that claimant has suffered a 38 percent loss of the ability to perform tasks pursuant to K.S.A. 44-510e. However, the final determination of

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[4] *State ex rel Wolgast v. Schurle*, 11 Kan. App. 2d 390, Syl. ¶ 3, 722 P.2d 585 (1986).

[5] *In re Tax Appeal of Collingwood Grain, Inc.,* 257 Kan. 237, 255, 891 P.2d 422 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] K.S.A. 44-510e(a).

[8] K.S.A. 44-551(b)(1).

claimant's permanent partial general disability cannot be made until such time as the post-injury wage information is made available pursuant to the subpoena served upon claimant.

**IT IS SO ORDERED.**

Dated this ____ day of July 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
C. Anderson Russell, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director